Supreme Court, U.S.
FILED
MAY 6 2002
OFFICE OF THE CLERK

No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC.,
ROBERT BABB, EDEE TEMPLET,
and KENNETH A. DEVUN,

Petitioners,

v.

HURLEY HENSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

HUGH YOUNG
JONATHAN HARRISON
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
Suite 510
1850 Centennial Park Drive
Reston, Virginia 22091

ROBERT N. WEINER
Counsel of Record
DANIEL S. PARISER
JONATHAN P. HOOKS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amicus Curiae

173841

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

45 pp

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iii
Interest Of Amicus Curiae	1
Summary Of Argument	1
Background	3
A. The Torrent of Individual Cases	4
B. The Spread of Duplicative Class Actions	6
C. Class Settlements and Widespread Efforts to Evade Them	8
Argument	13
I. The All Writs Act Confers Removal Authority Based On Continuing Jurisdiction To Enforce A Prior Federal Court Judgment.	13
II. Removal Is An Appropriate Exercise Of Authority Under The All Writs Act To Effectuate The District Court's Prior Judgment.	18
A. The All Writs Act Supplements Section 1441	18

Contents

Page

B. Removal Intrudes Less on the Prerogatives of the State Court than an Injunction and Should Be an Available Remedy 23

Conclusion 29

Appendix — Corporate Members Of Product Liability Advisory Council, Inc. 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 28

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 3, 4, 8, 11, 12, 25

Bd. of County Comm'rs of Labette Co., Kan. v. United States ex rel. Moulton, 112 U.S. 217 (1884) 17

Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999) 10

Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993) 10

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 24

Clinton v. Goldsmith, 526 U.S. 529 (1999) 17, 18

Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118 (S.D.N.Y. 2001) 10

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 20

FTC v. Dean Foods Co., 384 U.S. 597 (1966) 20, 21

Georgine v. Amchem Prods., Inc., No. Civ. A. 93-0215, 1995 WL 561297 (E.D. Pa. Sept. 18, 1995) 10, 11, 26

Page

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 10

Helvering v. Hallock, 309 U.S. 106 (1940) 21

Henson v. Ciba-Geigy Corp., 261 F.3d 1065 (11th Cir. 2001) 13, 14, 16, 19, 23

Hillman v. Webley, 115 F.3d 1461 (10th Cir. 1997) .. 10

Hills & Co. v. Hoover, 220 U.S. 329 (1911) 22

Holland v. New Jersey Dept. of Corr., Civ. A. Nos. 93-1683, 94-2391, 94-3087, 1994 WL 507801 (D.N.J. Sept. 14, 1994) 10

In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993) 9

In re Am. Honda Motor Co., Dealerships Relations Litig., 162 F. Supp. 2d 387 (D. Md. 2001) 10

In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985) 10, 24

In re BankAmerica Corp. Sec. Litig., 95 F. Supp. 2d 1044 (E.D. Mo. 2000), *aff'd*, 263 F.3d 795 (8th Cir. 2001) 10

In re Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1300 (2002) 8

In re Claasen, 140 U.S. 200 (1891) 22

Page

In re Corrugated Container Antitrust Litig., 659 F.2d 1332 (5th Cir. 1981) 24

In re Diet Drugs, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) 4, 5, 6, 9, 10, 11, 12, 26

In re First Commodity Corp. of Boston, Customer Accounts Litig., 89 B.R. 283 (D. Mass. 1988) 10

In re Joint E. & S. Dists. Asbestos Litig., 120 B.R. 648 (E.D.N.Y. and S.D.N.Y. 1990) 10

In re Joint E. & S. Dists. Asbestos Litig., 134 F.R.D. 32 (E.D.N.Y. and S.D.N.Y. 1990) 10

In re Lease Oil Antitrust Litig. (No. II), 48 F. Supp. 2d 699 (S.D. Tex. 1998) 10

In re Painewebber Ltd. P'ships Litig., No. 94 Civ. 8547 SHS, 1996 WL 374162 (S.D.N.Y. July 1, 1996) 10

In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355 (3d Cir. 2001) 11, 24, 26, 27, 28

In re Prudential Ins. Co. of Am. Sales Practices Litig., No. MDL 1061, Civ. A. 95-4704, 1999 WL 496491 (D.N.J. May 6, 1999) 10

In re School Asbestos Litig., No. 83-0268, 1991 WL 61156 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991) 10

Page

In re Synthroid Mktg. Litig., 197 F.R.D. 607 (N.D. Ill. 2000) 10

In re Texas, 110 F. Supp. 2d 514 (E.D. Tex. 2000) ... 10

In re VMS Secs. Litig., 103 F.3d 1317 (7th Cir. 1996) 9, 24

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 2, 15

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 20

Marshall v. Am. Gen. Life & Accident Ins. Co., 174 F. Supp. 2d 709 (M.D. Tenn. 2001) 10

McClellan v. Carland, 217 U.S. 268 (1910) 21

McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813) .. 17

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399 (7th Cir. 2000), *cert. denied*, 522 U.S. 1038 (2001) 10, 14

Mycka v. Celotex Corp., No. Civ. A. 87-2633, 1988 WL 80042 (D.D.C. July 18, 1988) 10

NAACP v. Metro. Council, 144 F.3d 1168 (8th Cir. 1998) 10

Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 19

Page

Peacock v. Thomas, 516 U.S. 349 (1996) 2, 15, 16

Pennsylvania Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34 (1985) 2, 18, 22, 23

Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998) 16, 17

Scardelletti v. Debarr, 265 F.3d 195 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001) 10

Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001) 10

Texas v. Real Parties in Interest, 259 F.3d 387 (5th Cir. 2001) 19

United States v. Morgan, 346 U.S. 502 (1954) 21

United States v. New York Tel. Co., 434 U.S. 159 (1977) 13, 17, 18, 22, 23

Wayman v. Southard, 23 U.S. 1 (1825) 15, 22

White v. Nat'l Football League, 41 F.3d 402 (8th Cir. 1994), *abrogated on other grounds, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) 10

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988) 14, 25

Younger v. Harris, 401 U.S. 37 (1971) 25

Page

Statutes:

28 U.S.C. § 1291 20

28 U.S.C. § 1292 20

28 U.S.C. § 1331 17

28 U.S.C. § 1404(a) 27

28 U.S.C. § 1407 ..... 6, 27

28 U.S.C. § 1441 19

28 U.S.C. § 1441(a) 19

28 U.S.C. § 1447(b) 22

28 U.S.C. § 1651 ..... 12, 22

28 U.S.C. § 1651(a) 1, 13, 23

28 U.S.C. § 2241 21

28 U.S.C. § 2255 21

28 U.S.C. § 2283 ..... 23, 25

26 Stat. at L.826, chap. 517 21

Rule:

Fed. R. Civ. P. 8(f) 14

Page

Other Authorities:

Alejandro Bodipo-Memba, *Judge OKs Class Action in Tire Case; Ford, Firestone Plan to Appeal*, Detroit Free Press, Nov. 29, 2001 5

Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the House Committee on the Judiciary, 107th Cong., 2d Sess. (2002) 6

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000) 11

John H. Beisner & Jessica Davison Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2002) .. 7

Firestone Settles 40 Percent of Suits, AP Online, July 23, 2001, *available at* 2001 WL 25486106 ..... 5, 7

Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001 ..... 5, 7

Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401 (1999) 19

H.R. Rep. No. 107-370 (2002) 6, 7, 8

Page

Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73 (1789) 25

Manual for Complex Litigation (Third) § 41.44 (1995) 9

Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong., 2d Sess. 96 (1998) 5, 6

Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 Tulane L. Rev 1655 (2000) 12

Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747 (2002) 12, 26

Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983) 19

Press Release, Stanford Law School Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002), *available at* http:/securities.stanford.edu/scac_press/20020315_CR_SCAC.pdf 7

Page

Stanford Law School Securities Class Action Clearinghouse, *Post-Reform Act Securities Case Settlements: Securities Fraud "Mega-Settlements" List, available at* http://securities.stanford.edu/Settlements/largest__post__reform__act.html 8, 9

Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773 (2000) 19

Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (1990) 19

Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999) 5, 8

5 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 1286 (3d ed 1998) (hereinafter "Wright & Miller") 14

13 Wright & Miller § 3521 25

14C Wright & Miller § 3729 14

16 Wright & Miller § 3934.1 20

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 122 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

SUMMARY OF ARGUMENT

The Court of Appeals' formulation of the issue here — whether the All Writs Act provides an "independent" basis for federal jurisdiction — is imprecise. The Act authorizes issuance of writs "in aid of" a federal court's retained jurisdiction over a prior judgment. 28 U.S.C. § 1651(a). Federal courts have ancillary jurisdiction to enforce and

---

1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this brief. Copies of those consents have been filed with the Clerk of the Court.

protect such prior judgments. Within that authority, the All Writs Act provides the statutory or procedural mechanism by which the courts act.

This Court has approved the exercise of ancillary enforcement jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-80 (1994). To that end, it has "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings . . . to assist in the protection and enforcement of federal judgments." *Peacock v. Thomas*, 516 U.S. 349, 356 (1996).

The All Writs Act authorizes removal of a case that falls within the ancillary enforcement jurisdiction of the federal courts. The Court of Appeals suggested that, in enacting other more specific removal provisions, Congress intended to exclude removal from the writs authorized by the All Writs Act. That argument contrives an intent Congress did not express. Nothing in the removal statutes or their legislative history suggests any inclination to limit the remedies available under the All Writs Act. Indeed, Congress seems to have enacted the All Writs Act precisely to provide the federal courts with the flexibility and authority necessary to protect their jurisdiction through procedural mechanisms such as removal. After all, this Court has repeatedly construed the All Writs Act to fill "the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 41 (1985).

Nor is the existence of a similar remedy under the All Writs Act, injunctive relief, a reason to preclude use of the Act to remove a case under appropriate circumstances.

In suggesting that the availability of injunctive relief under the Act rendered removal unnecessary, the Court of Appeals confused the threshold for invoking the All Writs Act with the standard for determining what type of relief under the Act is proper. A federal court should have discretion to choose the remedy most appropriate to the particular case before it. If anything, removal — as a well-accepted and even routine practice — in many circumstances does less to undermine the prerogatives of state courts and more to foster comity than enjoining a pending state proceeding.

Indeed, this may be increasingly so after the decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Parties seeking to comply with that decision are fashioning settlements that permit class members to opt out in the future as to certain claims and under specified conditions. Federal courts called upon to enforce the settlements, if limited to injunctive relief, will have to impinge significantly on state court proceedings, dismissing some claims, modifying others, barring certain arguments, and even regulating discovery. Removal avoids those potential intrusions. The federal courts should not be denied this valuable procedural tool under the All Writs Act.

BACKGROUND

This case exemplifies a significant practical problem confronting the federal courts: how a federal court can protect and effectuate a class action settlement over which it has retained jurisdiction in the face of efforts by litigants to evade that settlement.

Recent years have witnessed a deluge of mass tort claims, as well as financial and consumer fraud litigation, including not only individual actions, but also proliferating and duplicative class actions. Class actions in general may offer

potential efficiencies, but they also harbor significant difficulties. They not only magnify the risks for defendants, but also replicate those dangers again and again in copycat actions filed around the nation. Defendants overwhelmed by this assault have often sought to achieve some respite — to buy peace — by negotiating global class action settlements in federal court, at least within the limits allowed by this Court in *Amchem*. But just as water inevitably seeks an outlet, the impulse to litigate seeks a loophole, spawning efforts to evade the lawful orders of federal district courts which bar further litigation of settled claims. This case and many like it involve nothing more than efforts to enforce those orders, and implicate nothing less than the continued integrity of the judicial function.

A. *The Torrent of Individual Cases*

In *Amchem*, this Court recognized the magnitude of the problem presented by asbestos – hundreds of thousands of lawsuits, long delays, repetitive litigation of the same issues, immense transaction costs, and ultimately the threat of exhaustion of the defendants' assets. *See id.* at 598; *id.* at 632 (Breyer, J., concurring in part and dissenting in part). But that was just for one product. A multitude of individual cases involving other products also have clogged the courts — including well over 18,000 claims involving diet drugs; more than 3000 cases involving computer keyboards; 4500 individual lawsuits involving the diabetes drug Rezulin; more than 500 personal injury cases involving automobile tires; over 4000 cases involving the contraceptive Norplant; more than 4000 cases involving bone screws used for spinal support after surgery; and over 27,000 cases in federal court plus thousands more in state court (1800 in California alone) involving breast implants.[2]

2. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-

(Cont'd)

Judge Anthony Scirica of the U.S. Court of Appeals for the Third Circuit, chair of the Judicial Conference Committee on Rules of Practice and Procedure, noted these disquieting forces in testimony before Congress:

> The literature is full of articles documenting the steady upward trend in mass tort filings. Toxic torts, imperfect drugs, defective products, faulty medical devices, and other products of modern technology all have been held accountable for causing harm to large numbers of people. Consumer fraud, in the nature of deceptive practices, is also part of the mass torts landscape. It is apparent that the future will generate still more mass torts litigation.

Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 2d Sess. 19 (1998) (statement of Anthony Scirica, U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit).

Many thousands of these individual cases, not brought as class actions, have proceeded in state courts, as plaintiffs have joined non-diverse defendants — often improperly — to avoid federal jurisdiction. Because it is impossible in state

(Cont'd)

20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000) (diet drugs); Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999), at 21-23 (keyboards), 42-45 (Norplant), 45-47 (bone screws), 53-55 (breast implants); Alejandro Bodipo-Memba, *Judge OKs Class Action in Tire Case; Ford, Firestone Plan to Appeal*, Detroit Free Press, Nov. 29, 2001, at 1D (tires); *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106 (same); Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1 (Rezulin).

court to consolidate all claims nationwide, as the multi-district litigation statute allows in federal court, 28 U.S.C. § 1407, defendants must litigate those individual cases "banana by banana," or at least "bunch by bunch," in each state. The burdens on the parties, as well as the courts, are potentially ruinous.

B. *The Spread of Duplicative Class Actions*

Compounding the difficulties posed by the proliferation of individual lawsuits across the country has been the surge of class action filings. A recent study by the RAND Institute for Civil Justice documented a doubling or tripling of putative class actions, concentrated in state courts. *See* H.R. Rep. No. 107-370, at 12 (2002) (citing *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the House Committee on the Judiciary*, 107th Cong., 2d Sess. (2002) (statement of John Beisner)). Another survey showed that class actions filed in federal court had increased 340 percent over the past decade, while those filed in state court had increased 1315 percent. *See* H.R. Rep. No. 107-370, at 12. The General Counsel of Ford Motor Company recently attested to over 100 class action lawsuits pending as of 1997, up from 50 in 1995, against that company *alone*. *See Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong., 2d Sess. 96-97 (1998) (statement of John W. Martin, Jr., Vice President and General Counsel, Ford Motor Co.). Similarly, over 100 class actions were instituted against American Home Products Corporation following withdrawal of its diet medications Pondimin and Redux from the market in 1997. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000). There are 105 class actions involving the diabetes drug Rezulin and over 100 involving automobile tires.

See Lisa Girion et al., *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1; *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106. A few state trial courts have become magnets for many of these interstate class actions. Indeed, one county judge certified 35 classes from 1996 to 1998, compared to 35 for 1997 in the entire federal court system. *See* H.R. Rep. No. 107-370, at 18. Even outside of the mass tort arena, the numbers of class action filings have increased dramatically in recent years. *See* Press Release, Stanford Law School Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002), *available at* http://securities.stanford.edu/scac_press/20020315_CR_SCAC.pdf (announcing that 327 federal class action lawsuits were filed in 2001 — a 60 percent increase from the previous year).

This multiplicity of class actions has strained the judicial system, and burdened litigants. A recent report to the Judicial Conference Advisory Committee on Civil Rules worried that, "[a]s a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward." Memorandum from Judge Lee Rosenthal, Prof. H. Cooper, Prof. Richard Marcus, to Advisory Comm. on Civil Rules (Apr. 10, 2001) (quoted in John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 145 (2002)). Along the same lines, a Congressional report appraised the casualties that result from this cross-fire:

> In the Federal court system, class actions asserting the same claims on behalf of the same or overlapping classes may be transferred to one district for coordinated or consolidated pretrial

> proceedings. When these class actions are pending in State courts, however, there is no corresponding mechanism for cogently adjudicating the competing suits.

H.R. Rep. No. 107-370, at 10.

C. *Class Settlements and Widespread Efforts to Evade Them*

It may be, as this Court noted in *Amchem*, that a legislative remedy is the best solution to the proliferation of multiple repetitive litigation. Yet absent legislative action, which has been under discussion for many years, federal judges still must adjudicate cases before them using the legitimate tools at their disposal. In practice, a partial solution to the pandemonium of this mass litigation does lie within the authority of the federal courts, and litigants have in fact pursued it. Consistent with the limits set by *Amchem*, they have reached global settlements of federal class actions that resolve many, potentially thousands, of the cases in federal and state court, including the numerous copycat class actions. As of January 1999, there were class settlements affecting all or part of 10 mass tort litigations, and two more awaited judicial approval. *See* Thomas E. Willging et al., *Individual Characteristics of Mass Torts Case Congregations: A Report to the Mass Torts Working Group* (Federal Judicial Center 1999), at 9. In the securities fraud context, there have been 12 class settlements since 1995 that have been valued at more than 100 million dollars each, including a settlement of over 3.2 billion dollars in the *Cendant* litigation. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 217 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1300 (2002); Stanford Law School Securities Class Action Clearinghouse, *Post-Reform Act Securities Case Settlements: Securities Fraud "Mega-Settlements" List*, *available at* http://securities.stanford.edu/Settlements/

largest__ post__reform__act.html. As part of such settlements, the federal district courts typically retain jurisdiction to enforce their terms, including provisions barring other suits. *See In re Diet Drugs*, 2000 WL 1222042, at *72 (retaining jurisdiction over nationwide diet drug settlement); *see also* Manual for Complex Litigation (Third) § 41.44 (1995) (form of order approving settlement and containing reservation of jurisdiction). Unfortunately, many litigants, unwilling to accept the finality of federal court judgments in the face of opportunities to submerge their claims with thousands of others, have sought to evade the orders of those courts and to pursue the cases that federal courts have resolved.

The prevalence of these efforts is evident from the very line of cases that this Court granted *certiorari* to review. In *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1429 (2d Cir. 1993), for example, the court had previously approved a 180 million dollar settlement of claims involving the use of Agent Orange during the Vietnam War. As part of the prior settlement, the district court barred class members from instituting actions based on exposure to Agent Orange, and retained jurisdiction to administer the settlement. *See id.* Five years later, plaintiffs brought two class action suits in Texas state court asserting claims identical to those extinguished by the prior settlement. *See id.* at 1430. Similarly, in *In re VMS Securities Litigation*, 103 F.3d 1317, 1319-20 (7th Cir. 1996), class members who had not opted out of a class action settlement under the federal securities law subsequently brought a class action in California state court alleging that the defendant had fraudulently induced them to settle. There, too, the district court had enjoined further litigation and had retained jurisdiction to enforce its orders. *See id.* at 1320. In both these cases, courts approved removal under the All Writs Act to deal with the violations of the court orders. In scores of other reported cases, whether

or not they approve invocation of the All Writs Act, courts have confronted similar efforts to evade prior orders entered in settlement of class action litigation.[3]

---

3. *See In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001); *Scardelletti v. Debarr*, 265 F.3d 195 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (2001); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000), *cert. denied*, 522 U.S. 1038 (2001); *Bylinski v. City of Allen Park*, 169 F.3d 1001 (6th Cir. 1999); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *NAACP v. Metro. Council*, 144 F.3d 1168 (8th Cir. 1998); *Hillman v. Webley*, 115 F.3d 1461 (10th Cir. 1997); *White v. Nat'l Football League*, 41 F.3d 402 (8th Cir. 1994), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); *Marshall v. Am. Gen. Life & Accident Ins. Co.*, 174 F. Supp. 2d 709 (M.D. Tenn. 2001); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118 (S.D.N.Y. 2001); *In re Am. Honda Motor Co., Dealerships Relations Litig.*, 162 F. Supp. 2d 387 (D. Md. 2001); *In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000); *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000), *aff'd*, 263 F.3d 795 (8th Cir. 2001); *In re Synthroid Mktg. Litig.*, 197 F.R.D. 607 (N.D. Ill. 2000); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, No. MDL 1061, Civ. A. 95-4704, 1999 WL 496491 (D.N.J. May 6, 1999); *In re Lease Oil Antitrust Litig. (No. II)*, 48 F. Supp. 2d 699 (S.D. Tex. 1998); *In re Painewebber Ltd. P'ships Litig.*, No. 94 Civ. 8547 SHS, 1996 WL 374162 (S.D.N.Y. July 1, 1996); *Georgine v. Amchem Prods., Inc.*, No. Civ. A. 93-0215, 1995 WL 561297 (E.D. Pa. Sept. 18, 1995); *Holland v. New Jersey Dept. of Corr.*, Civ. A. Nos. 93-1683, 94-2391, 94-3087, 1994 WL 507801 (D.N.J. Sept. 14, 1994); *In re School Asbestos Litig.*, No. 83-0268, 1991 WL 61156 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3d Cir. 1991); *In re Joint E. & S. Dists. Asbestos Litig.*, 134 F.R.D. 32 (E.D.N.Y. and S.D.N.Y. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 120 B.R. 648 (E.D.N.Y. and S.D.N.Y. 1990); *Mycka v. Celotex Corp.*, No. Civ. A. 87-2633, 1988 WL 80042 (D.D.C. July 18, 1988); *In re First Commodity Corp. of Boston, Customer Accounts Litig.*, 89 B.R. 283 (D. Mass. 1988).

Such efforts persist. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 363 (3d Cir. 2001). And they are likely to increase further as litigants craft settlements consistent with the dictates of *Amchem*. As noted, the court in that case expressed concern that a class action settlement could bind claimants who might not "even know of their exposure, or realize the extent of the harm they may incur" and who consequently might "not have the information or foresight needed to decide, intelligently, whether to stay in or opt out." *Amchem*, 521 U.S. at 628. To ameliorate this problem, litigants have negotiated, and courts have approved, so called "back-end" opt-out rights in connection with class action settlements, enabling claimants to exit the settlement and to pursue claims in the tort system should their medical condition change over time. *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630-31 (3d Cir. 1996) (subsequent history omitted) (explaining that "because of the difficulty in forecasting what their futures hold, [class members in the asbestos settlement ultimately overturned in *Amchem*] would probably desire a delayed opt out like the one employed in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992)"); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 432-33 (2000).

Such back-end opt-out provisions result from arduous negotiations and inevitably reflect a delicate balance between defendants' rights to finality and limited liability, on the one hand, and claimants' interests in flexibility to re-enter the tort system, on the other. For example, in the recent diet drug settlement involving some 6 million class members, which was approved by the United States District Court for the Eastern District of Pennsylvania, the settlement agreement allowed two separate opportunities for claimants to exit the settlement later. *See In re Diet Drugs*, 2000 WL 1222042, at

*25-26 (E.D. Pa. Aug. 28, 2000). In exchange for the defendant's waiver of the statute of limitations and other defenses, both of those opt-out opportunities were limited in certain respects, for example, precluding claims for punitive damages by later opt-out claimants and restricting permissible causes of action to those based on specific medical conditions. *See id.* One commentator has hailed the diet drug settlement's structure in this respect as "a bold new approach" to "reconcile the demands of autonomy and peace in the mass tort class action." Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 796 (2002).

Amchem will likely yield more and more such settlements with back-end opt-outs for those whose injuries arise or worsen after the settlement is concluded. *See* Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 Tulane L. Rev 1655, 1676 (2000). That some class members under these procedures can legitimately bring cases after a global settlement while others cannot virtually assures disputes, as litigants whose claims are barred try to shoehorn themselves within the negotiated exceptions. Increasingly, courts will have to resolve those disputes, or else undercut the very mechanisms that *Amchem* demands.

To do that, federal courts will need the flexibility to employ all the authorized means at their disposal to preserve and protect the peace for which the parties have bargained. The All Writs Act confers on federal courts the statutory authority to enforce their judgments under appropriate circumstances using any means that are "agreeable to the usages and principles of law." 28 U.S.C. § 1651. As discussed below, where litigants flout a settlement over which a federal court has retained jurisdiction, removal is one of the tools in the toolbox which fall within that authority.

ARGUMENT

I. The All Writs Act Confers Removal Authority Based On Continuing Jurisdiction To Enforce A Prior Federal Court Judgment.

The Court of Appeals imprecisely characterized the issue presented in this case, assessing whether the All Writs Act conferred an "*independent basis* of federal subject-matter jurisdiction" to permit removal. *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1070 (11th Cir. 2001) (emphasis added). By its terms, though, the All Writs Act authorizes federal courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*." 28 U.S.C. § 1651(a) (emphasis added). This Court confirmed the source of that authority in *United States v. New York Telephone Company*, 434 U.S. 159, 172 (1977), noting that a federal court has power "to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders previously issued in its exercise of *jurisdiction otherwise obtained*." (emphasis added). In this case, the District Court, in the prior *Price* action, had approved the stipulation of settlement, an express term of which was the dismissal of the *Henson* case. *See Henson*, 261 F.3d at 1067. Moreover, the District Court explicitly retained jurisdiction to enforce that stipulation of settlement. *See* Joint App. 88a, 93a. Thus, the removal is "in aid of," and derives from, the District Court's continuing jurisdiction to enforce the very terms of its judgment in *Price*.

It follows that while the All Writs Act does provide statutory authority for the procedure of removing a case to federal court, the assumption of jurisdiction underlying that removal is ancillary to the jurisdiction the Court previously acquired and retained over the earlier action. As Wright and Miller observe, "[i]n exceptional circumstances a federal

court may use its authority under Section 1651 of Title 28, the All Writs Act, to remove an otherwise non-removable state court case. . . . The exercise of this power may be thought to be in the nature of ancillary removal jurisdiction." 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 3729 (3d ed. 1998) (hereinafter "Wright & Miller") (internal quotations and footnote omitted); *cf. Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 411-12 & n.4 (7th Cir. 2000) (explaining that the All Writs Act is "simply the source of authority for removal" of cases where ancillary enforcement jurisdiction exists).[4]

This Court has recognized that a federal court has ancillary jurisdiction "(1) to permit disposition by a single

4. The Court of Appeals declined to address "ancillary jurisdiction" in this case because, it stated, Petitioner did not assert it. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 n.3 (11th Cir. 2001). But the assertion of jurisdiction under the All Writs Act, which by its terms refers to jurisdiction previously obtained, is inherently an invocation of ancillary jurisdiction. This Court should not require the incantation of magic words to re-characterize what reliance on the statute necessarily entails. *See* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); 5 Wright & Miller § 1286 ("The federal rules do not adhere to the ancient principle that a pleading must be construed most strongly against the pleader. Nor do the federal courts require technical exactness or draw refined inferences against the pleader.") (footnotes omitted).

In any event, the District Court's own authority to enforce its judgments and protect its jurisdiction cannot be circumscribed by the parties' characterization of the source of that authority. The District Court has its own interests in preserving the integrity of its judgments, and has the independent authority to assert jurisdiction in order to do so. *Cf. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 858 (2d Cir. 1988) (approving the district court's *sua sponte* ordering of defendant to remove a case pursuant to the All Writs Act).

court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994) (citations omitted). The first type of ancillary jurisdiction, that based merely on "factual and logical dependence on the primary lawsuit," cannot support a subsequent lawsuit based solely on federal jurisdiction over the prior suit. *See Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (internal quotations omitted). But that is not the case with the second form of ancillary jurisdiction, which has been characterized as "ancillary enforcement jurisdiction." *Id.* at 356. Thus, this Court has "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings" brought to protect and enforce prior federal judgments. *Id.*; *cf. Wayman v. Southard*, 23 U.S. 1, 23 (1825) (Marshall, J.) ("The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."). Asserting ancillary enforcement jurisdiction over this case similarly enables the District Court to vindicate its authority and effectuate the decree it entered in *Price*.

The principles articulated by this Court in *Kokkonen* and *Peacock* thus strongly support the exercise of ancillary jurisdiction here. To be sure, the ultimate decision in *Peacock*, applying those principles, was to deny jurisdiction. But the facts of *Peacock* are very different from the facts here. After obtaining a judgment in an ERISA case, the respondent in *Peacock* brought a new suit in federal court against a third party alleging a conspiracy to prevent satisfaction of that judgment. *See Peacock*, 516 U.S. at 351-52. There was no independent basis of federal jurisdiction over that conspiracy claim. This Court held that there also was no ancillary jurisdiction. *See id.* at 354-55. In the Court's view, ancillary enforcement jurisdiction over subsequent proceedings did

not extend so far as to impose an obligation or to enforce a judgment upon a third party "not already liable for that judgment." *Id.* at 357. Rather, ancillary enforcement jurisdiction is confined to proceedings brought "to execute, or to guarantee eventual executability of, a federal judgment." *Id.* In addition, the Court further warned against the exercise of ancillary jurisdiction over proceedings that are "entirely new and original," *id.* at 358, noting that the new *Peacock* case was founded upon different facts than the first ERISA suit and entirely new theories of liability. *Id.*

Unlike the situation in *Peacock* itself, the assertion of ancillary jurisdiction here involves a direct effort to enforce the plain terms of a prior judgment upon a party who is manifestly bound by that judgment. To begin with, this suit involves precisely the same parties as the original action — a participant and intervenor in the settlement in the prior action and the settling defendant in that case. *See Henson*, 261 F.3d 1066-67. Second, the plaintiff in this case violated the District Court's explicit order dismissing the precise claims the plaintiff asserted. Third, unlike the situation in *Peacock*, the original suit here has not terminated. In *Peacock*, the district court entered judgment in the ERISA action and the case ended. In this case, by contrast, the District Court *retained jurisdiction*, and the case thus endures. The action is therefore not "entirely new and original." *Peacock*, 516 U.S. at 358 (internal quotations and citations omitted). Although characterized as a new action by plaintiffs in order to avoid the judgment in *Price* extinguishing their claim, in substance it is nothing more than a continuation of the original action.[5]

5. A plaintiff may not, by artful pleading, avoid a federal court's assertion of ancillary jurisdiction or its invocation of the All Writs Act to enforce its judgments. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998), is not to the contrary. The question in *Rivet*, a (Cont'd)

Moreover, because the Court of Appeals misperceived the issue as whether the All Writs Act could confer jurisdiction absent any preexisting source of jurisdictional authority, the cases relied upon by the Court of Appeals do not govern here. In *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), for example, the circuit court lacked authority to address the mandamus application before it because the petitioner framed that application as an original proceeding before the circuit court, not as a means of enforcing or protecting the court's jurisdiction "otherwise obtained." *See Bd. of County Comm'rs of Labette Co., Kan. v. United States ex rel. Moulton*, 112 U.S. 217, 221 (1884) ("[T]he writ [of mandamus] issues out of [circuit courts] only in aid of a jurisdiction previously acquired."); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). In this case, however, the defendant sought removal explicitly as a means of enforcing the district court's jurisdiction over its dismissal order, not as an entirely independent proceeding.

Similarly, in *Clinton v. Goldsmith*, 526 U.S. 529, 535-36 (1999), the relief sought under the All Writs order evinced no logical connection with the pre-existing jurisdiction of the issuing court, the Air Force Court of Criminal Appeals ("CAAF"). By statute, the jurisdiction of the CAAF was

(Cont'd)
case purportedly arising under federal law within the meaning of 28 U.S.C. § 1331, was whether "removal may be predicated on a defendant's assertion that a prior federal judgment has disposed of the entire matter and thus bars plaintiffs from later pursuing a state-law based case." 522 U.S. at 472. The defendants in that case asserted that jurisdiction lay under § 1331 on the basis of a purely defensive plea raised in the state court proceeding. Neither the defendant nor the district court raised the All Writs Act as a basis for removal, nor had the district court in the prior federal action retained jurisdiction to enforce its orders. *Rivet* thus did not involve, as this case does, invocation of the expressly retained jurisdiction of a federal court in the prior action upon which the removal was based.

expressly limited to review of the findings and sentence of a court-martial. The application by the respondent service-member for extraordinary relief in that case sought review of an executive action of the Air Force in removing his name from the Air Force rolls. *See id.* Accordingly, the Court found that the relief sought was not "in aid of" the CAAF's existing (or potential) jurisdiction. *Id.* By contrast, in this case, the respondent's initiation of an action barred by the district court's order was linked directly to the court's retained jurisdiction over that order. The relief sought here has a logical nexus to, and is "in aid of," the Court's existing jurisdiction.

In sum, it is far too facile to deny the authority to remove a case based on the notion that the All Writs Act cannot confer "independent" jurisdiction. The All Writs Act need not confer "independent jurisdiction" over the removed action, but merely supply the statutory authority to bring before the district court a case over which it possesses ancillary enforcement jurisdiction. Accordingly, there is no jurisdictional obstacle to using the All Writs Act to protect and effectuate those orders through removal of a state court action.

II. Removal Is An Appropriate Exercise Of Authority Under The All Writs Act To Effectuate The District Court's Prior Judgment.

A. *The All Writs Act Supplements Section 1441*

This Court has held that the All Writs Act fills "the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 41 (1985); *see also New York Tel.*, 434 U.S. at 172-73. The Court of Appeals below overlooked this function of the All Writs Act when

it concluded that 28 U.S.C. § 1441(a) exhausts the circumstances under which removal is permitted, as have those commentators who have disapproved of removal pursuant to the All Writs Act. *See* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. Pa. L. Rev. 401, 435-37 (1999); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. Rev. 773, 820-21 (2000).

The argument mounted by some defenders of the Court of Appeals' position, that the specification of conditions for removal in Section 1441 reflects legislative intent to preclude removal under the All Writs Act, implicitly invokes the canon of construction *expressio unius est exclusio alterius* — what is not included is excluded. *See Henson*, 251 F.3d at 1071; *cf. Texas v. Real Parties in Interest*, 259 F.3d 387, 393-94 (5th Cir. 2001) (concluding that it would be "bold indeed" to read the All Writs Act to permit removal where not otherwise permitted by § 1441). This Court, however, has cast a skeptical eye on the *expressio unius* canon because it rests on the improbable inference that Congress, by its silence, implicitly considered — and rejected — other legislative alternatives. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991) ("the principle *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence'") (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990)); Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 813 (1983) ("The canon expressio unius is . . . based on the assumption of legislative omniscience. . . .").

Two possibilities here are far more likely than this far-fetched assumption. The first is that in enacting the removal statutes applicable in the broad run of cases, Congress simply

did not contemplate extraordinary circumstances such as those presented here. As a unanimous Court recently explained when rejecting the *expressio unius* maxim in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999), "[n]ow and then silence is not pregnant." Second, Congress may have assumed that it had allowed for those extraordinary circumstances in the All Writs Act, the very purpose of which is to afford judicial remedies where not otherwise authorized by statute.

The analogy to the federal appellate courts' mandamus power demonstrates the limitations of the *expressio unius* principle in interpreting the All Writs Act. In 28 U.S.C. §§ 1291 and 1292, Congress delimited the courts of appeals' appellate jurisdiction, over both final judgments and interlocutory orders. Yet the courts of appeals have long resorted to their mandamus power under the All Writs Act when extraordinary relief is justified and existing statutory bases for appellate jurisdiction are inadequate. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 254 (1957) (rejecting petitioner's argument that the district court's "action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment"); *see also* 16 Wright & Miller § 3934.1 ("Writ review that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders.").

In other contexts as well, this Court has rejected efforts to glean some Congressional intent, lurking in other remedial statutes, to constrict use of the All Writs Act. In *FTC v. Dean Foods Co.*, 384 U.S. 597, 599 (1966), for example, the FTC asked the court of appeals to grant a preliminary injunction under the All Writs Act against a merger that allegedly

violated the Clayton Act. The respondents observed that the FTC had previously sought statutory authority to issue injunctions itself or to seek such relief from the district courts. By failing to confer that authority, the respondents argued, Congress intended to deny authority to seek injunctive relief from the court of appeals. *See id.* at 608. The court rejected that argument, stating: "We cannot infer from the fact that Congress took no action at all on the request of the Commission to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies." *Id.* at 609-10; *see also id.* at 609 n.11 (quoting *Helvering v. Hallock*, 309 U.S. 106, 120 (1940), for the proposition that "to give weight to the nonaction of Congress was to 'venture into speculative unrealities'").

Instead, this Court and the courts of appeals have read the All Writs Act to provide the basis for numerous other writs not otherwise specifically authorized by statute. For example, in *United States v. Morgan*, 346 U.S. 502, 512 (1954), the Court held that the writ of coram nobis was available pursuant to the All Writs Act to correct errors "of the most fundamental character" when relief was not otherwise available — *i.e.*, pursuant to the habeas corpus statutes, 28 U.S.C. §§ 2241, 2255. *Id.*; *see also id.* at 506 ("Since this motion in the nature of the ancient writ of coram nobis is not specifically authorized by any statute enacted by Congress, the power to grant such relief, if it exists, must come from the all-writs section of the Judicial Code."). This Court has held that a writ of certiorari may issue even where unauthorized by the statute ordinarily providing for discretionary review of appellate court judgments by this Court. *See McClellan v. Carland*, 217 U.S. 268, 278 (1910) (holding that the power of this Court to issue certiorari pursuant to the contemporary All Writs Act is not limited by § 10 of the court of appeals act, 26 Stat. at L.826, chap. 517).

And the federal courts may issue a writ of supersedeas, even though "there is no express provision in the [court of appeals act] for a *supersedeas* and stay of execution." *In re Claasen*, 140 U.S. 200, 207 (1891). *See also Hills & Co. v. Hoover*, 220 U.S. 329, 337 (1911) (explaining that the contemporary All Writs Act authorizes a writ in the nature of replevin); *Wayman v. Southard*, 23 U.S. 1, 23 (1825) (Marshall, J.) (explaining that the contemporary All Writs Act authorizes a writ of execution). Similarly, removal is nothing more than another form of writ authorized by 28 U.S.C. § 1651 to provide relief where other statutory mechanisms are found insufficient.[6]

Indeed, that Congress did not explicitly provide for removal in the particular circumstances here, far from counseling against use of the All Writs Act, actually supports it. As noted, the very purpose of All Writs Act is to fill the gaps left by explicit statutory grants of authority. As this Court explained in *Pennsylvania Bureau of Correction*, "[t]he All Writs Act is a residual source of authority to issue writs *that are not otherwise covered by statute*." 474 U.S. at 43 (emphasis added). Thus, for example, in *New York Telephone Company*, the absence of appropriate statutory means to implement pen register orders, among other things, led the

6. Both of the essential components of removal are, at base, procedures available by the issuance of writs that have long been accepted by this Court as properly authorized under the All Writs Act. The requirement that the state court cease proceedings upon filing of the petition for removal has the same practical effect as an injunction against the prosecution of that action. And the power of the federal court to compel the parties or the state court to file with it a copy of the record of the proceedings may similarly be analogized to the traditional writ of certiorari. In fact, the removal statute expressly invokes that analogy. *See* 28 U.S.C. § 1447(b) ("The [district court] may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it *by writ of certiorari* issued to such State court.") (emphasis added).

Court to affirm use of the All Writs Act to compel third parties to install the devices. *See* 434 U.S. at 175. ("[W]ithout the Company's assistance [as required by the All Writs Act order in question] there is no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished."). That same result should follow here.

B. *Removal Intrudes Less on the Prerogatives of the State Court than an Injunction and Should Be an Available Remedy*

The Court of Appeals embraced a false dichotomy when it concluded that removal jurisdiction was not "necessary" to protect the District Court's injunction due to the "ready remedy" of injunctive relief pursuant to the All Writs Act. *See Henson*, 261 F.3d at 1071. This holding confuses the threshold standard for invoking the All Writs Act with the determination of which remedy under the Act is appropriate once that threshold test is satisfied.

In order for extraordinary relief to be appropriate under the Act, there must be a showing of necessity, in that statutory procedures apart from the All Writs Act cannot afford the requisite relief. *See Pennsylvania Bureau of Corr.*, 474 U.S. at 43. But neither the statute nor this Court's decisions hold that, when that showing has been made and extraordinary relief is indeed justified under the All Writs Act, a district court is restricted to only one of the extraordinary remedies the statute provides. The Act, as noted, empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). It does not distinguish among those writs, preferring one to another.

To be sure, federal courts do have authority under the All Writs Act and the Anti-Injunction Act, 28 U.S.C. § 2283,

to enjoin state court lawsuits where necessary or appropriate to protect and effectuate their judgments. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-47 (1988) (explaining the authority of a federal court to enjoin pending state court proceedings that seek to relitigate its judgments).[7] But it is not clear why the Court of Appeals regarded such an injunction as so far superior to removal across the board. In an injunction proceeding, as in a removal, the parties still must appear before the federal forum to litigate the propriety of that relief, even if in some metaphysical sense the underlying "case" is not before that court. Further, the parties to an injunction proceeding generally must present the federal court with relevant portions of the record in the state court to support or refute the need for injunctive relief. In fact, in order to facilitate its determination of the case, the federal court can order production of the entire record, just as the record must be transferred in a removal proceeding. And in issuing an injunction, the federal court can even go so far as to decide the case, in the sense that it can direct the parties to dismiss it, or to drop or modify certain claims.

If anything, removal disturbs the comity between state and federal courts *less* than an injunction does. Enjoining a lawsuit in state court, while sometimes necessary, has long been recognized as a significant intrusion on the prerogatives of state courts. For that reason, Congress enacted the Anti-Injunction Act strictly limiting the circumstances in which

7. The lower federal courts have on numerous occasions employed anti-suit injunctions to protect or effectuate federal court jurisdiction pursuant to the All Writs Act and Anti-Injunction Act in the context of pending or potential comprehensive class action settlements such as the one at issue in this case. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 361 (3d Cir. 2001); *In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996); *In re Baldwin-United Corp.*, 770 F.2d 328, 333 (2d Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334 (5th Cir. 1981).

such relief is available. *See* 28 U.S.C. § 2283; *see also Younger v. Harris*, 401 U.S. 37, 45 (1971) (setting forth "some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"). By contrast, removal is a common, well-established, and even routine mechanism. It was part of the Federal Judiciary Act of 1789. *See* 13 Wright & Miller § 3521; Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (1789). Parties have removed thousands of cases since then, without creating undue friction between state and federal courts and without a line of removal cases expressing grave concern about comity or imbalance in federal-state relations. While a removal petition does halt proceedings in state courts in the same manner as an injunction, it simply does not carry the same connotations of untoward interference with state court proceedings that can accompany an anti-suit injunction. As the Second Circuit Court of Appeals has concluded, when compared to injunctive relief the "[u]se of the All Writs Act . . . to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988); *see also Younger*, 401 U.S. at 44 (explaining that under "Our Federalism," federal interests should be vindicated "in ways that will not unduly interfere with the legitimate activities of the States.").

The differing level of intrusiveness in state court proceedings could assume even greater import with the advent of "back-end" opt-out rights in the post-*Amchem* era. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). As noted, to address the concerns the Court expressed in *Amchem* about binding claimants whose injuries may arise or worsen in the future, litigants have negotiated back-end opt-out rights in connection with class action settlements,

enabling claimants to exit the settlement and to pursue claims in the tort system should their medical condition change over time. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *20 (E.D. Pa. Aug. 28, 2000); *see also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996) (subsequent history omitted) (explaining that class members would probably desire a delayed opt out where uncertainty exists as to future harm). Indeed, such back-end opt-out rights are not merely a valuable feature in such settlements; their use has also been hailed as a "fundamental shift" in the manner in which mass torts may be resolved through class settlements. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 756 (2002).

Because settling defendants must secure some benefit in exchange for providing class members with the right to later proceed in the tort system, such back-end opt-outs are, by their nature, limited in certain respects. For example, they may allow plaintiffs to bring certain claims but not others. *See id.* at 757. This, in consequence, creates significant potential for plaintiffs to join permissible with impermissible claims. Restricting the federal courts to injunctions to enforce these settlements would require them effectively to reach into the state court and conduct "surgery" from afar.

Federal courts, for example, might have to mandate specific amendments to class members' complaints so that the complaints comply with any restrictions imposed by the settlement agreement on such "later opt-out" class members' claims. Or the federal court might have to direct the dismissal of certain counts and not others. Or it might need to enjoin particular arguments by the parties. In general, the federal court might have to re-mold the suit in accordance with the prior orders of the court. *Cf. In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 363 (3d Cir. 2001) (enjoining litigant from pursuing particular discovery or presenting specific evidence in a state court action when doing so would violate a release of certain claims effected by a prior federal class action settlement). By contrast, when such a purported back-end opt-out case is removed from state court, the federal court no longer has to delve into the state court proceedings to fashion appropriate relief. The federal court that retained jurisdiction to enforce the settlement, and that is most familiar with the terms of that settlement, simply brings the case before it, eliminating the need to intrude into a case pending before a state court judge.[8]

A hypothetical example illustrates the potentially greater intrusion on the dignitary interests of state courts posed by injunctive relief compared to removal. Suppose a mass tort class action settlement in federal court provided for back-end opt-outs for class members who later contracted cancer as a result of exposure to the subject products — but prohibited the class members from pursuing punitive damages or claims other than the cancer claim. Suppose further that after exercising such a back-end opt-out, a class member filed a state court claim alleging a blood disorder and cancer, seeking punitive as well as compensatory damages. If the defendant could only seek injunctive relief from the federal court rather than removal, the federal court might find it necessary to fashion an order striking claims related to the blood disorder and punitive damages. Moreover, the court might also have to edit the factual allegations in the complaint and other pleadings providing the bases for such impermissible claims. In addition, the federal court might have to order limitations on discovery regarding the impermissible claims, as well as to enjoin the class member

8. If the case is not removed initially to the Court that issued the original judgment, it may be transferred there pursuant to 28 U.S.C. § 1404(a) or § 1407.

from raising arguments relating to them. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355 (3d Cir. 2001).

Administering such an injunction would entangle the federal court with the state court proceeding in a manner that imperils comity far more than removal would. Indeed, the federal court might have to struggle to avoid "micro-management" of the state proceeding. For example, if the federal court limited discovery relating to prohibited claims, it could undermine the state court's control over the discovery process. Further, it could present logistical problems for the state court in managing its docket, as it awaited resolution of questions by the federal court before it could proceed with its own tasks. And such entanglement by the federal court could risk inconsistent orders were plaintiffs to move to compel discovery responses in state court while defendants sought protective orders in federal court. In short, the situation presents significant potential for confrontation and confusion.

Of course, in some situations, the federal court might find itself better able to protect its jurisdiction and the continuing effectiveness of its orders through injunctive relief rather than removal. But that determination will depend on the particular facts and circumstances of each case. It is therefore best consigned to the discretion of the district courts. Particularly given the functional similarities between removal and injunctive relief, it would elevate form over substance to deny such discretion, and to preclude a court from considering either alternative. As this Court has held, "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942). Such formalism is particularly inappropriate here because removal may be not only more effective and efficient,

but also more conducive to the comity that ought to characterize relations between state and federal courts. In sum, nothing in any federal statute or policy cabins the discretion of federal courts in their choice of remedies under the All Writs Act.

CONCLUSION

For those reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT N. WEINER
Counsel of Record
DANIEL S. PARISER
JONATHAN P. HOOKS
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

HUGH YOUNG
JONATHAN HARRISON
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
Suite 510
1850 Centennial Park Drive
Reston, Virginia 22091

Attorneys for Amicus Curiae

APPENDIX

APPENDIX

APPENDIX A — CORPORATE MEMBERS OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

BIC Corporation

Biro Manufacturing

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

C. R. Bard, Inc.

Caterpillar Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

E & J Gallo Winery

E. I. DuPont de Nemours Company Inc. and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

Appendix A

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Lincoln Electric Holdings, Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R & D of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Raytheon Aircraft Company

Rheem Manufacturing

Appendix A

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.